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February 22, 2008

Via Electronic and U.S. Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of OREGON PUBLIC UTILITY STAFF Requesting the
Commission direct PACIFICORP, dba PACIFIC POWER & LIGHT
COMPANY, to file tariffs establishing automatic adjustment clauses under the
terms of SB 408
Docket No. UE 177

Dear Filing Center:

Enclosed please find the original and one (1) copy of the Industrial Customers of
Northwest Utilities' Reply to PacifiCorp's Motion in Limine in the above-referenced matter.

Thank you for your assistance.

Sincerely yours,

/s/ Eric G. Shelton
Eric G. Shelton

Enclosure

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Reply to PacifiCorp's Motion in Limine on behalf of the Industrial Customers of Northwest Utilities upon the parties, shown below, on the official service list by causing the foregoing document to be deposited, postage-prepaid, in the U.S. Mail, and service via electronic mail.

Dated at Portland, Oregon, this 22nd day of February, 2008.

/s/ Eric G. Shelton
Eric G. Shelton

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W = Waived Paper Service

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177

In the Matter)	
)	
OREGON PUBLIC UTILITY STAFF)	ICNU’S REPLY TO PACIFICORP’S
)	MOTION IN LIMINE OBJECTING
Requesting the Commission Direct)	TO THE ADMISSION OF THE
)	DIRECT TESTIMONY OF ELLEN
PACIFICORP, dba PACIFIC POWER)	BLUMENTHAL
& LIGHT COMPANY,)	
)	
to File Tariffs Establishing Automatic)	
Adjustment Clauses Under the Terms of)	
SB 408.)	

Pursuant to OAR 860-013-0050(3)(d), the Industrial Customers of Northwest Utilities (“ICNU”) submits this Reply in response to PacifiCorp’s Motion in Limine, which objects to the Direct Testimony of ICNU witness Ellen Blumenthal (“Motion”). PacifiCorp’s Motion fails on the merits, and it is procedurally improper. PacifiCorp’s objection to Ms. Blumenthal’s Testimony was made two business days before the hearing is to be held, almost a full month after Ms. Blumenthal’s Testimony was filed with the Commission, and some two weeks after PacifiCorp *actually responded* to Ms. Blumenthal’s Testimony. By failing to object earlier, PacifiCorp has waived all objections it may have to Ms. Blumenthal’s Testimony. Moreover, Ms. Blumenthal’s Testimony is unquestionably relevant to this proceeding because she addresses the central factual issue of whether PacifiCorp’s Tax Report properly reflects PacifiCorp’s actual

taxes paid as required by SB 408. For the reasons detailed below, PacifiCorp's Motion should be denied.

I. BACKGROUND

Pursuant to the Prehearing Conference Memorandum issued on November 7, 2007, ICNU filed the Direct Testimony of Ellen Blumenthal on January 22, 2008. On February 12, 2008, PacifiCorp filed rebuttal testimony, responding to the issues raised in Ms. Blumenthal's Testimony. Staff also submitted rebuttal testimony responding to Ms. Blumenthal's Testimony, along with a Motion for Leave to Submit Rebuttal Testimony.

Two business days^{1/} before the hearing, PacifiCorp submitted a Motion in Limine objecting to Ms. Blumenthal's Testimony. In the Motion, PacifiCorp asserted that Ms. Blumenthal's Testimony is irrelevant because: 1) the Testimony attacks the validity of OAR § 860-022-0041, which the Commission does not have the authority to waive; and 2) the Testimony argues over the requirements of the Protective Order in this Docket, which the Commission issued in Order No. 06-033, and reaffirmed in Order No. 08-022. PacifiCorp has waived all objections to Ms. Blumenthal's Testimony at this late-stage of the proceedings, and there is no merit to PacifiCorp's arguments.

II. ARGUMENT

A. PacifiCorp's Motion is Procedurally Flawed, and PacifiCorp has Waived its Objections

PacifiCorp has tried to fit a square peg into a round hole. PacifiCorp's Motion is an attempt to apply the litigation tools available to parties to a jury trial to an

^{1/} ICNU received PacifiCorp's Motion at the end of the day (4:30 p.m.) on Tuesday, February 19, 2008.

administrative proceeding. An administrative proceeding, however, is far different from a jury trial. A motion in limine is a procedural tactic that has no place in an administrative setting. Neither the Oregon Rules of Civil Procedure nor the Oregon Rules of Evidence specifically provide for a motion in limine. See, e.g., State v. Madison, 290 Or. 573, 575 (1981) (attempting to explain the origins of a motion in limine). Rather, this is a practice that is utilized in jury trials in an attempt to exclude prejudicial evidence before the jury hears such evidence. Unlike a trial, Ms. Blumenthal’s Testimony is pre-filed, affording PacifiCorp ample time to object to the testimony well in advance of the hearing. In fact, if PacifiCorp found the testimony so objectionable, it should have filed a motion to strike, and not filed two pieces of rebuttal testimony responding in detail to Ms. Blumenthal’s Testimony.

1. The OPUC is a Specialized Agency not Subject to the Same Susceptibility to Prejudice as a Jury

A motion in limine is typically a pre-trial attempt to limit the introduction of evidence to prevent the prejudicial effect of the evidence on the jury. See, e.g., State v. Foster, 296 Or. 174, 182 (1983) (“[M]otion in limine provides a legal procedure to flush out problems to be encountered during the trial, before a jury is contaminated with the evidence.”); OEC 403 (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]”). It is without question that the OPUC has specialized expertise in the setting of rates. Dreyer v. Portland Gen. Elec., 341 Or. 262, 285 (2006). PacifiCorp’s

Motion, therefore, suggests that the Commission is unable to give the evidence in this Docket the proper weight when discharging its duties in setting rates.

The Commission acts as the “jury” in the sense that the Commission is the ultimate fact finder in proceedings before the Commission. PacifiCorp’s Motion essentially equates the Commission with that of a “lay jury” that is susceptible to a decision on an improper basis, such as emotions. See, e.g., State v. Bowen, 340 Or. 487, 494 (2006). The OPUC is not in the same position as a lay jury. The OPUC has the expertise to weigh the evidence as it sees appropriate without susceptibility to emotional responses. The same risks inherent in a jury trial simply do not exist at the OPUC. Further, it is imperative that the OPUC have a full and complete record from which to make a decision. See, Re Qwest Corp., Docket No. UM 1025, Order No. 03-533 at 8 (Aug. 28, 2003) (withholding information would prevent the Commission “from making decisions based on a full and complete record”).

2. The Commission’s Rules do not Provide for a Motion in Limine

As stated previously, motions in limine are not specifically authorized by the Oregon Rules of Civil Procedure or the Oregon Rules of Evidence. The Commission’s rules, however, specifically provide for motions practice before the Commission. Under OAR § 860-013-0050(d), ICNU has 15 days to respond to PacifiCorp’s Motion unless otherwise specified by the Commission’s rules or the Administrative Law Judge.

No other specification has been made in this case. Motions in limine are not specifically provided for, and PacifiCorp failed to request expedited consideration of

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its Motion. Had PacifiCorp properly filed a motion to strike when Ms. Blumenthal's Testimony was filed, the Commission's procedure could have been followed. Because PacifiCorp waited until two business days before the hearing to submit its Motion, however, ICNU's right to respond to PacifiCorp's Motion is substantially prejudiced.

3. PacifiCorp's Failure to Earlier Object is Deemed a Waiver of all Objections

It is well-settled that a motion objecting to testimony "must be made *as soon as* the ground for such motion is disclosed." McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 421 (1974) (emphasis added); Wallender v. Michas, 256 Or. 587, 592 (1970); see also Central Lincoln People's Utility District v. Verizon Northwest, Inc., Docket No. UM 1087, Ruling at 2 (Oct. 6, 2004) (denying a motion in limine to exclude testimony *once it became apparent* that the witness would be unavailable for cross-examination). Unlike a typical jury trial where testimony is given at the trial, the Commission usually requires testimony to be filed in writing well in advance of the hearing. OAR § 860-014-0060(4)(a). ICNU filed Ms. Blumenthal's Testimony nearly a month ago and PacifiCorp was alerted to ICNU's position in this case at that time. Procedurally, the proper action PacifiCorp was required to take was to file a motion to strike Ms. Blumenthal's Testimony. Instead, PacifiCorp filed Reply Testimony actually responding in detail to the issues raised in Ms. Blumenthal's Testimony. By failing to file a motion to strike and filing Reply Testimony, PacifiCorp has waived any objections it has to Ms. Blumenthal's Testimony. See Wallender, 256 Or at 592.

B. This is the First Opportunity for ICNU to Raise its Arguments

This Docket presents the first opportunity to determine how OAR § 860-022-0041 operates with actual tax data. The Commission adopted OAR § 860-022-0041 on September 14, 2006, in Docket No. AR 499. PacifiCorp filed a tax report for the 2005 tax year on October 16, 2006.^{2/} No rate change was required for PacifiCorp's tax report for the 2005 tax year because the SB 408 automatic adjustment clause did not apply to taxes collected and paid before January 1, 2006. As a result, on January 18, 2007, Staff filed a letter with the Commission informing the Commission that there were no contested issues with respect to PacifiCorp's 2005 tax report and requesting that the Commission suspend the procedural schedule. On January 19, 2007, ICNU filed a letter with the Commission supporting Staff's position, but clarifying that ICNU's support was based on the fact that there was no rate change at issue and that ICNU was expressly reserving all arguments for future filings when an actual rate adjustment will be at issue. OAR § 860-022-0041 was further amended in Docket No. AR 517. Because PacifiCorp's tax report for the 2006 tax year is the first time an actual rate adjustment is involved, this Docket presents the first opportunity to test the final rules passed in AR 517 with actual tax data.

C. Ms. Blumenthal's Testimony is Relevant to the Issues in this Case

PacifiCorp's Motion is premised on the argument that Ms. Blumenthal's Testimony is irrelevant because it constitutes legal argument and the Commission cannot waive its rules. In addition, PacifiCorp argues that Ms. Blumenthal's Testimony rehashes

^{2/} PacifiCorp's filing occurred on October 16, 2006 because October 15 fell on a Sunday.

arguments objecting to the Protective Order. PacifiCorp is incorrect. First, PacifiCorp mischaracterizes Ms. Blumenthal's Testimony as legal argument. Second, the Commission has previously waived its rules in the SB 408 context, and is required to do so if the Commission's rules violate its statutory authority. Lastly, with respect to PacifiCorp's argument regarding the Protective Order, Ms. Blumenthal's Testimony simply identifies the Protective Order as one reason no alternative calculation was given.

1. Ms. Blumenthal's Testimony is Necessary Evidence for Challenging OAR § 860-022-0041

Ms. Blumenthal's Testimony is not legal argument, as PacifiCorp suggests. Motion at 3. Ms. Blumenthal's Testimony addresses the fundamental factual question whether PacifiCorp's Tax Report reflects its actual taxes paid as required by SB 408. Without Ms. Blumenthal's Testimony of how OAR § 860-022-0041 works, ICNU would have no basis for its position that the Commission's rules produce a result that is inconsistent with SB 408. Therefore, Ms. Blumenthal's Testimony provides the technical analysis that allows ICNU's attorneys to make the legal argument. Without Ms. Blumenthal's analysis and conclusions ICNU would be unable to reach any conclusions regarding whether the stand alone calculation under the rules results in an actual taxes paid result required by SB 408. Ms. Blumenthal is not arguing that the rule itself violates SB 408 but rather the rule produces a result that violates the statute. The "result" is a fact that an expert like Ms. Blumenthal must testify to. ICNU's attorneys are not tax experts, and are not qualified to provide the detailed testimony regarding the effects of

implementing the Commission's rules. The effect of implementing the rules is a factual matter rather than a legal matter; therefore, PacifiCorp's argument is baseless.

If the Administrative Law Judge elects to treat the Motion as a motion to strike, the same analysis would apply. Ms. Blumenthal's Testimony is relevant expert opinion that addresses the factual questions of whether PacifiCorp's Tax Report is based on actual taxes paid as required by SB 408. Since this evidence is relevant, it should not be stricken. Further, even if the witness is giving her opinion about the requirement of the statute, it is a question that goes to the weight to be given to the evidence rather than its admissibility.

2. The Commission has Previously Waived its Rules when Enforcement of its Rules would Violate the Commission's Statutory Authority

In its Motion, PacifiCorp argues that the Commission has no authority to waive application of OAR § 860-022-0041. Motion at 3. PacifiCorp raised a similar argument in Docket No. UE 170 that was rejected by the Commission, and the Commission is advocating such a position in a pending case before the Court of Appeals. As a result, PacifiCorp's argument here should be rejected.

In Docket No. UE 170, the issue was whether the Commission should adjust the amount of taxes PacifiCorp was authorized to collect in rates in light of the recent passage of SB 408. Re PacifiCorp, Docket No. UE 170, Order No. 05-1050 at 13 (Sep. 28, 2005). PacifiCorp argued that the Commission's rules required the calculation of taxes on a stand-alone basis, and that deviation from the Commission's rules would be inappropriate. Id. at 16. In rejecting PacifiCorp's argument, the Commission recognized

that its rules and historic practice required a stand-alone approach to taxes, but that the Commission was not bound to follow its rules and historic practice when a new statute is passed ordering the Commission to change. Id. at 18.

In addition, in a pending case before the Court of Appeals, the Commission argues that it is not required to follow its own rules when to do so would violate its statutory authority. Crooked River Ranch Water Co. v. Pub. Util. Comm'n of Oregon, CA A134177, Respondent's Brief at 24-25 (Jan. 22, 2008). The question presented in Crooked River is whether OAR § 860-036-0412 requires the telephone number of each member of Crooked River Ranch Water Company petitioning the OPUC for regulation to be listed on the member's petition. The Commission's rule states that "[p]etitions *must* include . . . the member's . . . telephone number" OAR § 860-036-0412(2) (emphasis added). Despite the requirements of this rule, the Commission argues that enforcement of this requirement "would itself be invalid, and would exceed any rulemaking authority granted by ORS 757.063 . . . which requires PUC to count any and every petition that is filed by an association's members." Crooked River, CA A134177, Respondent's Brief at 24 (internal quotation marks omitted).

Therefore, the Commission recognizes that it cannot follow its own rules when to do so would violate its statutory authority. This recognizes that the Commission "is a legislative agency and has only those powers granted to it by the legislature." Advanced TV & Video v. Qwest Corp., Docket No. UC 454, Order No. 00-572 at 5 (Sep. 19, 2000). In this case, ICNU is arguing that OAR § 860-022-0041 produces a result that is not in compliance with SB 408, and that application of this rule would violate the

Commission's statutory authority under SB 408. Accordingly, Ms. Blumenthal's Testimony is directly relevant to the issues in this Docket.

3. ICNU is Required to Raise its Arguments with the Commission should ICNU Choose to Appeal

PacifiCorp asserts in its Motion that the proper channel for ICNU's arguments is to petition the Commission for amendment or repeal of OAR § 860-022-0041 under ORS § 183.390(1). Motion at 4. PacifiCorp is mistaken. If PacifiCorp had reviewed the very next statutory provision, ORS § 183.400(1), it would have discovered that any person may petition the Court of Appeals for a judicial determination of the validity of a rule by independent petition or in the appeal of a contested case.

More importantly, if ICNU chooses to appeal, ICNU is required to give the Commission an opportunity to first rule on whether to follow its own rules, as the Commission did in Docket No. UE 170. ORS 183.400(1) provides that:

The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.

(Emphasis added.) This case falls into the above-emphasized portion of ORS § 183.400(1). ICNU must challenge the validity of OAR § 860-022-0041 in this Docket, or it cannot independently challenge the rule or raise its arguments on appeal should ICNU choose to do so. See *Minor v. Adult and Family Serv. Div.*, 105 Or. App. 178, 182 (1991) (an independent rule challenge is prohibited when a party is a participant in a contested case where the rule challenge may be raised). Therefore, not only are ICNU's

arguments relevant to the issues in this Docket, but they *must* be raised in this Docket should ICNU choose to appeal.^{3/}

4. Ms. Blumenthal’s Testimony does not Challenge the Protective Order

PacifiCorp mischaracterizes Ms. Blumenthal’s Testimony as objecting to the terms of the Protective Order. Motion at 5. Ms. Blumenthal’s Testimony, however, simply provides an explanation to the Commission as to why Ms. Blumenthal could not provide an alternative calculation of PacifiCorp’s actual taxes paid. ICNU/100, Blumenthal/12. Moreover, Ms. Blumenthal’s Testimony provides the Commission further background on her experiences as an expert witness on tax issues in other jurisdictions, and the difficulties she encountered as a witness in this Docket compared to other jurisdictions. ICNU/100, Blumenthal/13-15.

^{3/} In Docket No. UE 178, despite a complete settlement of the outstanding issues regarding Portland General Electric Company’s (“PGE”) tax report, PGE intends to raise arguments regarding the Constitutionality of SB 408. PGE’s arguments will challenge the validity of the *entire* statute, and by implication, the Commission’s rules implementing the statute. These arguments are relevant to Docket No. UE 178, as PGE must raise these arguments to preserve their arguments for appeal.

III. CONCLUSION

For the foregoing reasons, PacifiCorp's Motion should be denied.

Dated this 22nd day of February, 2008.

Respectfully submitted,

/s/ Allen C. Chan

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